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IN THE

Supreme Court of the United States

October Term, 19.....

No. 647

KING COUNTY, a legal subdivision of the State of Washington; A. J. "Tony" Steen, as County Assessor of King County, Washington, and A. A. Tremper, as County Treasurer of King County, Washington,
Appellants,

v.

F. L. HARTUNG GLASS COMPANY, INC., a corporation,
Appellee/Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO DISMISS APPEAL and BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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METROPOLITAN PRESS AND WESTERN

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F. L. HARTUNG GLASS COMPANY, INC., a corporation,

Appellee Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee, the F. L. Hartung Glass Co., Inc., moves for an order dismissing King County's appeal from the decision of the Supreme Court of the State of Washington on the grounds that this court lacks jurisdiction to review, by appeal, the decision of that court.

In the court below, no issue as to the constitutionality of any statute, under either the Federal or Washington Constitutions, was raised or decided, but even if such an issue had been raised, the decision of the Washington Court having been in favor of the appellee's claim of

a federal constitutional immunity, this court has no jurisdiction to review the case, by appeal, under the applicable statute, 28 U.S.C. § 1257.

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Appellants,

v.

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Appellee Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

The only question presented for review is whether those goods of the respondent which had been imported from abroad had retained their character as imports within the meaning of Article I, § 10, Clause 2 of the Federal Constitution, at the time the petitioners attempted to assess them for purpose of the state and county *ad valorem tax*. This is the question which the petitioners have designated "Question Two."

The petitioners are in error in claiming that a question concerning the constitutionality of the state taxing statutes is presented for review.

The petitioners' "Third Question," if it is in fact a separate question from "Question Two," is not presented for review because it was not properly raised in the court below.

RESTATEMENT OF THE CASE

The judgment of the trial court (Trans. 16) determined only that the assessment of the respondent's goods was invalid to the extent it included foreign imports; it did not determine, either directly or otherwise, that the statutes under which petitioners had proceeded to assess the respondent's goods were unconstitutional under Article I, § 10, Clause 2 of the Federal Constitution.

ARGUMENT

In the Exercise of Its Discretion, the Court Should Deny the Petition for Certiorari.

The respondent, an importer-wholesaler, brought this action in the state court below to establish and enforce the immunity, from state *ad valorem* taxes, of certain glass products which it had imported from abroad, basing its claim of immunity on Article I, § 10, Clause 2 of the Federal Constitution. The Washington Court decided in favor of that immunity. Thus, under 28 U.S.C., § 1257 (3) a federal question is presented which this court has jurisdiction to review, in its discretion, by certiorari. Though the court has jurisdiction, there are no special and im-

portant reasons to justify a review of the Washington Court's decision.

A. Petitioner states that the first question presented concerns the constitutionality of the state statutes under which petitioners sought to assess and tax the respondent's goods. No such question is presented by this case. The question was neither raised, discussed nor decided in the court below. Respondent's complaint (Trans. 1) alleged only that the "purported assessment" was in violation of the Federal Constitution, not that the statute under which petitioners had assessed the goods, RCW 84.36.005, was unconstitutional. The judgment of the trial court (Trans. 16), and the decision of the Washington Supreme Court (Trans. 18, and Appendix "2" of petitioner's "Jurisdictional Statement for a Writ of Certiorari") decided only that the assessments were invalid and did not pass on the constitutionality of RCW 84.36.005. The reason why the constitutionality of that statute was not in question is found in the language of the statute itself, RCW 84.36.005, which provides:

> "All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at 12 o'clock meridian in each year, *excepting such as is exempted from taxation by law.*" (Emphasis added).

The question which this case presented, and which the Washington Court decided was simply whether the respondent's property was "such as is exempted from taxation by law"; thus, the court's determination that it

was so exempt in no way held the above-quoted statute to be unconstitutional under Article I, § 10, Clause 2 of the Federal Constitution, or any other constitutional provision.

B. The question presented by this case—whether the assessment was valid because the respondent's imported goods in question had entered the general mass of state property—was the only question raised and decided in the court below. Restated, the question is whether goods imported from abroad for resale, and held here by the importer in the ordinary course of his business, in the original package in which imported, lose their character as imports prior to their resale by the importer. That question was decided in the negative by this court in the case of *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419) 6 L.Ed. 678 (1827), and *Low v. Austin*, 80 U.S. 29 (13 Wall 29), 20 L.Ed. 517 (1871), among others. The Washington Court held that those decisions controlled the disposition of the *instant* case and decided in favor of respondent's claim of immunity.

The *instant* case does not present any facts or combination of facts that were not presented in the *Brown* and *Low* cases. the goods involved had been imported for resale and remained in the original package in which imported; the tax involved is an *ad valorem* tax as in the *Low* case; the placing of the goods in respondent's regular inventory for sale was not more of a "dedication to sale" than the actual sale involved in the *Brown* case; the respondent's business consists of the purchase and resale of finished goods, as was the business of the individuals concerned in the *Low* and the *Brown* cases. Thus

the Washington Court did not determine a Federal question which had not previously been passed upon by this court, Rule 19 U.S. Supreme Court Rules.

The Washington Court was correct in deciding the *instant* case in accordance with the rule of the *Brown* and *Low* cases, the applicable decisions of this court. In the Washington Supreme Court, petitioners conceded that the rule of the *Brown* and *Low* cases would have been determinative of the *instant* case, but argued that the rule of those cases had been modified *sub silentio* by the decision of this court in *Youngstown Sheet and Tube Co. v. Bowers*, and *U. S. Plywood Corp. v. City of Algoma*, reported together at 358 U.S. 534, 3 L.Ed.(2d) 490, 79 S. Ct. 383 (1958).

The court, in the *Youngstown* and *U. S. Plywood* cases, did not overrule *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827), either expressly or by implication. Instead, the court fitted its decision within the doctrine announced in the *Brown* case; and expressly recognized with approval, the statement by Chief Justice Marshall of three means by which imported goods may become incorporated into the general mass of property: sale by the importer; breaking the original package in which imported; use by the importer of goods imported for his own use. The issue before the court concerned the third of those means, but appellants in the *U. S. Plywood* case argued that the fact that the goods remained in their original package determined the issue as to whether they were being used. The court held that the fact that the goods remained in their original packages was not determinative of the question of whether they

were being used by the importer: that an irrevocable commitment to use constituted a use of the goods by the importer even though the goods remained in their original, unopened package. Thus, the court emphasized the distinct character of use by the importer and breaking of the original package as means of incorporation into the general mass of property. In the light of that emphasis, and in view of the fact that sale by the importer was not there in issue, the *Youngstown* and *U. S. Plywood* decision did not reject sale by the importer as a separate and distinct means of incorporation into the general mass of property, and therefore did not overrule the *Brown* case either expressly or by implication.

In holding that the *Youngstown* and *U. S. Plywood* decision had not overruled the doctrine of the *Brown* case, the Washington court noted that the same view had been taken in *Miehle Printing Press & Mfg. Co. v. Dept. of Revenue*, 18 Ill.(2d) 445, 164 N.E.(2d) 1 (1960) and *State ex rel. Morton Co. v. Board of Review*, 15 Wisc. (2d) 330, 112 N.W.(2d) 914 (1962), all of the cases in which the question had been presented to a state court of last resort.

Petitioners urge that the decision in *Youngstown Sheet & Tube Co. v. Bowers* and *U. S. Plywood v. City of Algoma*, reported together at 358 U.S. 534 3 L.Ed(2d) 490, 79 S. Ct. 383, is inconsistent with *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827) even if it did not overrule or modify the latter case. Petitioners argue that as "irrevocable commitment to use in manufacturing" has been held to terminate the character, as imports, of goods imported for the im-

porter's use in his manufacturing process so the court, in the *instant* case, should "by analogy" hold that an irrevocable commitment to "use of sale in a business" of goods imported for re-sale terminates their character as imports. Petitioners do not urge that irrevocable commitment to "use of sale in a business" should be held to constitute a sale of those goods, therefore, what petitioners are urging is not an analogy at all. Instead, they are urging that this court now reject sale as a separate and distinct means of terminating the character of goods as imports, and redefine the meaning of "use" so as to include the act of holding goods for resale as a use of those goods which will terminate their character as imports. One cannot deny that holding goods for sale is a "use" of those goods within one possible usage of that word, but, in the light of this court's long continued recognition of "sale" and "use" as separate and distinct means by which imported goods may lose their character as imports, which recognition was made by the court in the *Youngstown* and *U. S. Plywood* cases, it cannot be denied that this court has never employed the word "use" in the sense that petitioners now urge.

The adoption by this court of the redefinition of the word "use," urged by petitioners, would require that *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419); 6 L.Ed. 678 (1827) be completely overruled. Any dedication of goods to sale would have to precede the sale itself, and all goods sold have been dedicated to sale; therefore, if dedication to sale (or to "use of sale in a business") terminates the character of goods as imports, then all imported goods sold by an importer would have

lost their character as imports prior to their sale. When imported goods have lost their character as imports, they are subject to state taxation, and the extent and character of state taxation is a matter of legislative discretion; therefore, if all imported goods have lost their character as imports prior to their sale by the importer, then Article I, § 10, Clause 2, of the Federal Constitution would not prevent a state from requiring that importers obtain a license prior to selling any imported goods. That conclusion follows of necessity from the position urged by petitioners, yet the conclusion is directly contrary to the actual holding in the *Brown* case; therefore, this court could not adopt the proposition urged by petitioners without now overruling the *Brown* case.

C. If the third question which petitioners state is presented by this case is actually a separate question from the second one, then this court should refuse to consider that third question because it was not properly raised in the state court. On page four of their "Jurisdictional Statement for a Writ of Certiorari," petitioners claim only that the third question was raised on oral argument before the Washington Supreme Court. The opinion below neither mentioned nor decided that question. The rule is that unless it appears from the record brought up for review that the State Court was properly presented with the constitutional question, or at least considered it in reaching its decision, this court is without jurisdiction to review that question. *Bailey v. Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945).

Even if the third question had been presented to, or considered by the Washington Court, that court could

not have reached any decision other than that which it made, because the third question had previously been decided by this court against petitioners' contention. Article I, § 10, Clause 2, of the Federal Constitution is a prohibition on the power of the states to tax, not merely a regulation as to use of particular forms of taxes.

In *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827), the court construed Article I, § 10, Clause 2 as denying to the states the power to tax imports. This construction has been consistently followed by this court, is an essential premise of the holding in every case which the court has decided under the Import-Export Clause, and has never been questioned by any decision of this court. In *Low v. Austin*, 80 U.S. 29 (13 Wall. 29), 20 Ed. 517, this court specifically followed that construction and held that an *ad valorem* tax on imports was prohibited. Thus, the third question posed by petitioners has long been definitely settled by the decisions of this court; therefore, it is not of the general character of questions for which review by certiorari will be granted. Rule 19, Supreme Court Rules.

CONCLUSION

The court should deny the petition for a Writ of Certiorari on the ground that no special and important reasons are presented which would justify review by certiorari.

DATED December 12, 1962.

Respectfully submitted,

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